No. 93–714

IN THE

Supreme Court of the United States

APRIL TERM, 1994

U.S. BANCORP MORTGAGE COMPANY,

Petitioner,

vs.

BONNER MALL PARTNERSHIP,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE AMERICAN COUNCIL OF LIFE INSURANCE AND MORTGAGE BANKERS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

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BRIEF OF AMICI CURIAE AMERICAN COUNCIL OF LIFE INSURANCE AND MORTGAGE BANKERS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

This Brief, in support of Petitioner, is submitted in accordance with Rule 37 of the Rules of this Court and pursuant to the attached written consent of all parties.

INTEREST OF AMICI CURIAE

Amicus American Council of Life Insurance ("ACLI") is the principal national trade association of life insurers. ACLI's 634 member companies account for 90% of the legal reserve life insurance in this country and are among the nation's largest and most significant commercial lenders. In 1992, life companies' net new investment in U.S. capital markets totaled $107.3 billion — ranking second (only after mutual funds) among private domestic capital sources.[1]

The interest of ACLI arises out of the signal importance the decision below has to the commercial lending community. The issue presented — the existence and content of a new value exception to the absolute priority rule — lies at the core of bankruptcy reorganization. The absolute priority rule, as codified in Section 1129(b)(2)(B)(ii) of the Bankruptcy Reform Act of 1978 (the "Bankruptcy Code"), 11 U.S.C. § 101 *et seq.*, sets forth the fundamental ordering of rights and priorities between equity owners and creditors and "sets the ground rules of Chapter 11."[2]

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[1] American Council of Life Insurance, *1993 Life Insurance Fact Book Update* 46-54 (1993); *see also* American Council of Life Insurance, *1992 Life Insurance Fact Book* 84-103 (1992).

[2] Douglas G. Baird, *The Elements of Bankruptcy* 73 (1992); see also Elizabeth Warren, *A Theory of Absolute Priority*, 1991 Ann. Surv. Am. L. 9 (1992).

ACLI is also interested in this case because it concerns a defaulted mortgage loan and a commercial borrower's attempt judicially to impose a mortgage restructuring over the lender's objection. Life insurance companies are among the nation's largest direct lenders of mortgage money and purchasers of mortgages on the secondary mortgage market. At the end of 1992, life insurance companies held $242 billion in mortgages on United States real property, which represented 14.8 percent of the total assets held by life insurance companies that year.[3]

Amicus Mortgage Bankers Association of America ("MBAA") is the primary national trade association devoted to the field of mortgage and real estate financing. Mortgage banking firms, which comprise the largest part of MBAA's total membership of 2,600 corporations, engage in originating, financing, selling and servicing both residential and commercial mortgages. In 1993, MBAA members originated $12.8 billion in mortgage loans on commercial real estate and serviced in excess of $160 billion in commercial real estate mortgages. MBAA has the same interests as ACLI in this case.

As principal sources of mortgage funds and other investment capital in the United States, *amici* have a broad perspective on the merits of this case and the impact of the court of appeals decision. That decision not only (a) upholds the existence of a "new value" exception to the absolute priority rule, so that old equity, despite objection by a creditor class that will not be paid in full, may purchase ownership of the reorganized debtor, but (b) holds that old equity can be granted an *exclusive* right to purchase that ownership on terms set without competitive bid or other market exposure.

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[3] American Council of Life Insurance, *1993 Life Insurance Fact Book Update*, *supra*, at 46, 50; *see also* American Council of Life Insurance, *1992 Life Insurance Fact Book*, *supra*, at 85, 99. Moreover, life insurance companies held an additional $248.6 billion in mortgage related securities at the end of 1992. American Council of Life Insurance, *1993 Life Insurance Fact Book Update* at 49.

Amici support the position of Petitioner U.S. Bancorp Mortgage Company ("Bancorp"), which would bar old equity's ownership of the reorganized debtor unless the unsecured class is paid in full. *Amici* submit this brief, however, to urge that, regardless of whether the Court accepts Bancorp's position *in toto*, there is no basis in law for the grant of an exclusive right to old equity to purchase ownership of the reorganized entity — at a price old equity names without bid — over the objection of a class of unsecured creditors that will not be fully paid.

STATEMENT

The Single Asset Case

This case presents the familiar pattern of a single asset real estate case in Chapter 11. Such a case involves a debtor, like Respondent Bonner Mall Partnership (the "Debtor"), which owns a single commercial real estate asset (shopping mall, apartment complex, or office building) that generates substantially all the debtor's gross income. *See* Lisa Hill Fenning, *et al.*, *Good Faith: Roundtable Discussion*, 1 Am. Bankr. Inst. L. Rev. 11, 17-18 (1993). Single asset cases comprise a substantial portion — in some districts as much as half — of all Chapter 11 filings. *Id.* at 14-15.

In a single asset case, the asset often is fully encumbered by mortgage debt, with no equity value available for unsecured claimants or the owners. In the case at hand, the total mortgage debt owed to Bancorp was $6.6 million, while the collateral — a shopping mall — was valued by the bankruptcy court at $3.2 million. *In re Bonner Mall Partnership*, 2 F.3d 899, 905 (9th Cir. 1993).

In general, the crux of the single asset case is a dispute between the debtor and a single creditor, the mortgage lender. That lender is a potential bidder for ownership of the property.

Typically there are few trade creditors, and their claims, which are unsecured, often are dwarfed by the mortgage lender's unsecured deficiency claim. Linda J. Rusch, *Single Asset Cases And Chapter 11: The Classification Quandary*, 1 Am. Bankr. Inst. L. Rev. 43, 44-45 (1993). In the present case, for example, Bancorp's deficiency claim constitutes almost all the unsecured debt. *See infra* at 6.

The single asset debtor generally has few, if any, employees, and the property is often run by a management company. Upon sale or foreclosure, the property will continue to be operated without any loss of going concern value. *See* Note, *The New Value Exception: Square Peg In A Round Hole*, 1 Am. Bankr. Inst. L. Rev. 173, 192-93 (1993); Michael L. Molinaro, *Single-Asset Real Estate Bankruptcies: Curbing an Abuse of the Bankruptcy Process*, 24 UCC L.J. 161, 163-64 (1991).

The Bonner Mall Property

The Debtor here purchased the property at issue in October 1986, subject to Bancorp's lien. *Bonner Mall*, 2 F.3d at 901. The Debtor experienced cash flow difficulties and failed to pay real estate taxes. *Id.* at 902. In July 1990, Bancorp commenced a nonjudicial foreclosure action. *Id.*; P.A. A92.[4] After unsuccessful attempts to renegotiate and restructure the debt, Bancorp set a foreclosure sale for March 14, 1991. 2 F.3d at 902.

On the eve of foreclosure, the Debtor filed a voluntary Chapter 11 petition, thereby automatically staying the foreclosure sale. *Id. See also* 11 U.S.C. § 362(a). Soon thereafter, Bancorp moved for relief from the automatic stay under Code Section 362(d)(2), arguing that the debtor has no equity in the property on which the creditor seeks to foreclose and the property "is not necessary to an effective reorganization." 11 U.S.C. § 362(d)(2).

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[4] Citations to Petitioner's Appendix, attached to the Petition for Writ of Certiorari, appear as "P.A. ___." Citations to the Joint Appendix appear as "J.A. ___."

The bankruptcy court valued the mall at $3.2 million, establishing that the Debtor had *no* equity in the property. As a result, the bankruptcy court ruled that the Debtor had to show "a reasonable possibility of a successful reorganization within a reasonable time" in order to defeat Bancorp's motion for relief from the stay. P.A. A121, 126 (citation omitted).[5]

The Plan of Reorganization

On October 31, 1991, in response to the bankruptcy court's ruling, the Debtor filed its First Amended Plan of Reorganization (the "Plan"). P.A. A93. Under the Plan, the Debtor would transfer all its assets to a new entity, Bonner Properties, Inc. (the "Reorganized Debtor"). J.A. 19, Plan § 7.1. The Debtor's existing partners (old equity) would retain their ownership of the mall by purchasing 2,000,000 shares (100%) of the Reorganized Debtor's common stock for $200,000 cash. J.A. 18, 19, Plan §§ 5.5.1, 7.2. Old equity's right to acquire this common stock would be exclusive. *Id.*[6]

Pursuant to Section 506(a) of the Bankruptcy Code, Bancorp's $6.6 million claim would be divided into a secured claim to the extent of the value of the collateral ($3.2 million) and an unsecured deficiency claim of $3.4 million. 2 F.3d at 905.

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[5] Such showing is required to prove that the collateral is "necessary to an effective reorganization" for purposes of Section 362(d) of the Bankruptcy Code. *United Savings Assn. of Texas v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 375-76 (1988).

[6] Old equity also would undertake to fund any shortfall in the Reorganized Debtor's working capital for a 32 month period. J.A. 19, Plan § 7.2. In addition, an affiliate of the Debtor would contribute a junior mortgage on certain real property, the value of which was disputed, to guarantee obligations assumed by the Reorganized Debtor. In exchange for this collateral, however, the Reorganized Debtor would be required to service a substantial portion ($902,000) of the debt on that property. J.A. 20, Plan § 7.5.

Under Section 506(d) of the Bankruptcy Code, Bancorp's prepetition $6.6 million lien would be voided to the extent it exceeded the $3.2 million value of the collateral. The unsecured portion of Bancorp's claim represented the vast bulk (approximately 93%) of the Debtor's unsecured debt. *Id.*; P.A. A123.

Under the Plan, the $3.2 million secured portion of Bancorp's claim would be paid 32 months after the Plan's confirmation, with monthly interest payments at the rate of 7% per annum in the interim. J.A. 16-17, Plan § 5.3.1.

Bancorp, however, would receive no cash payment on its $3.4 million deficiency claim. J.A. 17, Plan § 5.4.1. Nor would any cash payment be made on any other unsecured claims in excess of $1,000. *Id.* Instead, all unsecured claims would be satisfied through a pro rata distribution of 300,000 shares of redeemable preferred stock in the Reorganized Debtor. Each share would have a par value and liquidation preference of $1.00. J.A. 17, 21-22, Plan §§ 5.4.1, 7.3. After final payment of Bancorp's secured claim, the preferred stock would be convertible into 300,000 shares of common stock (15% of the then outstanding common shares of the Reorganized Debtor). *Id.* In short, the holders of unsecured claims would receive preferred stock worth, at best, less than ten cents on the claim dollar. 2 F.3d at 905.

Proceedings Regarding New Value Exception

1. Bankruptcy Court Decision

After the Debtor filed its Plan, Bancorp renewed its motion for relief from the stay, arguing, *inter alia*, that a new value exception was not viable under the 1978 Bankruptcy Code and that the Plan violated the absolute priority rule. J.A. 29, 31. The bankruptcy court accepted this argument and granted Bancorp's motion. J.A. 29-33.

2. District Court Decision

On appeal, the district court reversed in reliance on this Court's decision in *Dewsnup v. Timm*, 502 U.S. ____, 112 S. Ct. 773 (1992), which the court viewed as "prescrib[ing] new standards for interpreting the Bankruptcy Code." P.A. A110. Under *Dewsnup*, as interpreted by the district court, "courts should try to construe the language [of the Bankruptcy Code] as consistent with pre-Code practices, unless some contrary intent is shown in the legislative history." P.A. A111.

Based on this Court's decision in *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106 (1939), the district court concluded that a new value exception had existed under the old 1898 Bankruptcy Act. Consistent with its understanding of *Dewsnup*, the district court ruled that the new value exception "survive[d] the enactment of the 1978 Bankruptcy Code." P.A. A116.

3. Court of Appeals Decision

The court of appeals affirmed the district court and remanded to the bankruptcy court for further proceedings. The court of appeals held "that the Code permits the confirmation of a reorganization plan that provides for the infusion of capital by the shareholders of the bankrupt corporation in exchange for stock if the plan meets the conditions that plans were required to meet prior to the Code's adoption." 2 F.3d at 907. The court reasoned that:

> (i) "[T]he plain language of section 1129(b)(2)(B)(ii) [absolute priority rule]" does not "by its terms eliminate, or even refer to, the new value exception." *Id.* at 908, 909-10.
>
> (ii) This Court had recognized a new value exception under the old Act in *Los Angeles Lumber*. *Id.* at 906.

(iii) Under *Dewsnup*, "[w]here the text of the Code does not unambiguously abrogate pre-Code practice, courts should presume that Congress intended it to continue unless the legislative history dictates a contrary result." *Id.* at 913.

The court of appeals acknowledged that Code Section 1129(b)(2)(B)(ii) "bars old equity from receiving any property via a reorganization plan '*on account of* its prior equitable ownership when all senior claim classes are not paid in full." *Id.* at 908. It concluded, however, that under the new value exception, the prior owners "participate in the reorganized debtor *on account of* a substantial, necessary, and fair new value contribution." *Id.* at 909. The court of appeals stated that the new value doctrine should be viewed not as an exception to absolute priority but rather as a "corollary" stating "the set of conditions under which former shareholders may lawfully obtain a priority interest in the reorganized venture." *Id.* at 906.

Perhaps most importantly, the court of appeals ruled that the new value exception permits confirmation of a plan that gives old equity *alone* the right to obtain an interest in the reorganized debtor. *Id.* at 910-11. In the court's view, the courts have power to afford such investors "a priority over an impaired class of creditors." *Id.* at 915. "The risk of self-dealing among these entities [debtor and old equity] at the expense of creditors is a risk created by the Code itself." *Id.*

The court of appeals rejected the holdings of the Fourth Circuit in *In re Bryson Properties, XVIII*, 961 F.2d 496 (4th Cir.), *cert. denied*, 113 S. Ct. 191 (1992), and other cases, that such exclusive purchase right, in and of itself, constitutes property received "on account of" old equity's prior ownership. 2 F.3d at 910-11. In the view of the court of appeals, vesting a preemptive purchase right in old equity, without exposing the interest being purchased to the market, "increases the amount available for the estate to use both in its reorganization and in funding the plan and paying creditors." *Id.* at 915.

SUMMARY OF ARGUMENT

The brief of Petitioner Bancorp presents ample authority demonstrating that under the absolute priority rule equity owners cannot participate in a reorganized enterprise over the dissent of a class of unsecured creditors who will not be paid in full. Although *amici* agree with Bancorp's position, pursuant to Supreme Court Rule 37, *amici* will not repeat Bancorp's legal presentation.

Amici submit this brief to urge that, regardless of the Court's ruling as to the existence *vel non* of a new value exception, there is *no* basis in law for the grant of an *exclusive* right to old equity to purchase ownership of the reorganized debtor over the objection of a class of unsecured creditors that will not be fully paid. Any such preemptive proprietary right in old equity is directly contrary to Section 1129(b)(2)(B)(ii) of the Bankruptcy Code, which prohibits old equity from receiving any property (including exclusive purchase rights) on account of its prior ownership, where an objecting creditor class will not be made whole on its debt.

Amici submit that the words of the statute are indisputably clear on this point. In light of conflicting judicial approaches to Bankruptcy Code construction, *amici* urge the Court to rule and reiterate that natural interpretation of plain statutory language should control absent compelling reason to the contrary. Here there is no such compelling reason.

ARGUMENT

A. THE ABSOLUTE PRIORITY RULE BARS THE GRANT, TO OWNERS OF AN INSOLVENT ENTERPRISE, OF AN EXCLUSIVE RIGHT TO PURCHASE THE REORGANIZED DEBTOR AT A PRICE SET BY OLD EQUITY WITHOUT OPPORTUNITY FOR COMPETITIVE BID OR COUNTERPROPOSAL.

1. Under The Absolute Priority Rule, The Debtor's Assets Are Properly Treated As Owned By The Creditors.

The absolute priority rule is expressly codified, without exception, in Section 1129(b)(2)(B) of the Bankruptcy Code. The rule provides that the debtor must pay a nonconsenting class of unsecured creditors in full[7] or "the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property." 11 U.S.C. § 1129(b)(2)(B).[8]

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[7] For purposes of making payment in full under Section 1129(b)(2)(B)(i), the debtor may pay creditors over time as long as the present value of the time payment at least equals the allowed amount of the claim. The property received by the creditors may be "tangible or intangible, including securities of the debtor or a successor to the debtor under a plan of reorganization." 3 David G. Epstein *et al.*, *Bankruptcy* § 10-21 (1992).

[8] Section 1129(b)(2)(B) provides:

> For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:
>
> ◆ ◆ ◆

footnote continued on page 11

The absolute priority rule is part of the Code's requirement that a reorganization plan be "fair and equitable" in order to be confirmed over objection of an unsecured creditor class that will not be paid in full. 11 U.S.C. § 1129(b)(1).[9] It is rooted in the concept that when an enterprise is insolvent, *i.e.*, the entity's

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footnote continued from page 10

> (B) With respect to a class of unsecured claims
>
> > (i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or
> >
> > (ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property.

11 U.S.C. § 1129(b)(2)(B).

[9] Confirmation of a plan over objection of an impaired creditor class, pursuant to Section 1129(b)(1), is commonly referred to as a "cramdown." Section 1129(b)(1) provides:

> (b)(1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) [acceptance of the plan by all impaired classes] are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

11 U.S.C. § 1129(b)(1).

debts exceed the present values of its assets, its assets are properly treated as owned by the creditors.[10]

As a principle of reorganization law, absolute priority had its origins in railroad equity receiverships. 3 David G. Epstein *et al.*, *Bankruptcy* § 11-25 (1992). As stated in a seminal receivership case:

> The property [of the debtor] was a trust fund charged primarily with the payment of corporate liabilities. Any device, whether by private contract or judicial sale under consent decree, whereby stockholders were preferred before the creditor, was invalid.

Northern Pacific Railway Co. v. Boyd, 228 U.S. 482, 504 (1913).[11]

Likewise today, "[c]reditors effectively own bankrupt firms." *Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351, 1360 (7th Cir. 1990). The Bankruptcy Code allows the creditors to consent to a plan that impairs their

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[10] The Bankruptcy Code does *not* require that an entity be insolvent in order to be eligible to seek Chapter 11 relief. See 11 U.S.C. § 109. Solvent companies, *i.e.*, entities whose asset values exceed their debts, can and sometimes do file for relief when they are unable to pay obligations coming due.

[11] A basic premise of absolute priority is that the entire going concern value of the insolvent debtor belongs to the creditors. *Boyd*, 228 U.S. at 508 ("If the value of the road justified the issuance of stock in exchange for old shares, the creditors were entitled to the benefit of that value, whether it was present or prospective, for dividends or only for purposes of control. In either event it was a right of property out of which the creditors were entitled to be paid before the stockholders could retain it for any purpose whatsoever."). *Accord Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 208 (1988). *See also* 3 Epstein, *supra*, § 11-30; *Consolidated Rock Products Co. v. Du Bois*, 312 U.S. 510, 529 (1941).

interests — in which case they sell ownership to old equity at an agreed price or give up equity interests in order to induce managers to stay on. *See* 11 U.S.C. § 1129(a)(8)(A).

On the other hand, under the absolute priority rule, the creditors can reject a "new value" plan if they believe the proposed equity payment to be inadequate — in which case confirmation should be flatly denied (as urged by Bancorp) or at a minimum competing bids for ownership of the reorganized debtor should be allowed.

As set forth by the National Bankruptcy Conference, in its recently released report on operation of the Code:

> If creditor acceptance is not obtained, the market has determined there is not sufficient new value to permit the owners of an insolvent enterprise to retain any interest in the reorganized entity.

National Bankruptcy Conference, *Bankruptcy Reform Circa 1993* 255 (ALI-ABA 1993).

2. The "New Value" Exception Adopted By The Court Of Appeals Gives "Property" "On Account Of" Old Equity's Prior Ownership Interest, In Violation Of The Code.

Indisputably, the plain terms of Section 1129(b)(2)(B)(ii) bar old equity from receiving "any property" "on account of" its prior ownership interest. The new value exception, as adopted by the court of appeals in this case, permits insiders to acquire the reorganized debtor in a private sale at which no other bidders are allowed and on terms rejected by the creditors, for whose benefit

ownership should be being sold.[12] The only redress the creditors have is to seek a judicial upset of the sale, arguing that the purchase price and terms do not meet the requirements of the new value exception set forth in the pre-Code dicta of *Los Angeles Lumber*, 308 U.S. 106.[13]

This exclusive right to purchase ownership is property. *See supra* at 12 n.11. Even the court of appeals acknowledged that a "stock purchase option is property." 2 F.3d at 910 n.27. *See also Bryson Properties*, 961 F.2d at 504; *Kham & Nate's Shoes*, 908 F.2d at 1360 (holding that an option to purchase stock is "property" under Section 1129(b)(2)(B)(ii)); *In re A.V.B.I., Inc.*, 143 B.R. 738, 740 (Bankr. C.D. Cal. 1992) (same). *See also Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 207-08 (1988) (holding that a retained equity interest is "property" even if it has no market value).

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[12] Application of this exception is graphically illustrated by the *Greystone* case. There, the bankruptcy court confirmed a "new value" plan which would have paid less than 4 cents on the dollar on unsecured claims, after refusing to consider a proposal by the mortgage lender to fund a plan of its own which would have paid all unsecured creditors in full, in cash, at confirmation. *In re Greystone III Joint Venture*, 995 F.2d 1274, 1277 (5th Cir.), *petition for rehearing granted in part and opinion withdrawn in part*, 995 F.2d 1284 (5th Cir.) (*per curiam*), *cert. denied*, 113 S. Ct. 72 (1992).

[13] The pre-Code new value exception as adopted by the Ninth Circuit, and incorporated by that court into the Bankruptcy Code, has the following requirements:

> Former equity owners [are] required to offer value that [is] 1) new, 2) substantial, 3) money or money's worth, 4) necessary for a successful reorganization and 5) reasonably equivalent to the value or interest received.

2 F.3d at 908 (citing *Los Angeles Lumber*, 308 U.S. at 121-22).

Therefore, what this case turns on (*if* old equity is permitted to participate in ownership over creditor objection), is whether this exclusive purchase option (property) is received "on account of" old equity's prior ownership.

The answer emphatically is *yes*. This preemptive right, if it exists, arises solely because in Chapter 11: (a) the debtor's pre-petition owners and their managers are generally permitted to remain in control of the debtor as a "debtor in possession," 11 U.S.C. §§ 1107, 1108; and (b) the debtor has an exclusive right for 120 days to propose a reorganization plan and an additional 60 day exclusive period to obtain acceptance of the plan. 11 U.S.C. § 1121(b), (c). In addition, extensions of exclusivity can be (and are) granted. *See* 11 U.S.C. § 1121(d).

Here, the court of appeals went out of its way to establish an exclusive purchase right in old equity. As the court of appeals noted, the Debtor had filed its plan after its exclusivity period had expired. Nevertheless, the court of appeals announced that even if plan exclusivity had not expired, "[w]e do not believe that this exclusivity period . . . makes the new value exception objectionable under the Code." 2 F.3d 910 n.26. "We believe that this same analysis [rejecting the Fourth Circuit's position in *Bryson Properties*] applies whether a plan gives old equity an exclusive or non-exclusive right of participation in a new value transaction." *Id.* at 911.[14]

Contrary to the court of appeals' position, the right to exclude others from equity ownership is material. Under the

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[14] Indeed, Bancorp advised the court of appeals that it would bid more than the Debtor in cash (rather than the securities offered by the Debtor) in a market transaction. *See* Appellant's Reply Brief, in the United States Court of Appeals for the Ninth Circuit, at 12-13. But for the Ninth Circuit's decision to establish a preemptive exclusive purchase right in old equity, the case could have returned to the bankruptcy court for resolution of competing bids.

present Code framework, it is only old equity's status and role as debtor in possession that even arguably gives it an exclusive opportunity to confirm a plan in which it sells ownership back to itself while holding all competitors at bay.

3. The Court Of Appeals' Reasoning, And Particularly Its Reliance On *Los Angeles Lumber*, Is Misplaced.

The court of appeals stated that old equity's exclusive purchase may be "on account of" "other reasons." *See* 2 F.3d at 910. This argument is unpersuasive. The court of appeals posits that the "other reasons" might be a belief that old equity "will enhance the value of the business" or that "there will be no other legitimate investors. . . ." *Id.* at 911. Yet, the only way to test the validity of these "other reasons" is to open the process to counterproposals from creditors or other parties in interest — which is precisely what the court of appeals refused to do.

The court of appeals' reliance on pre-Code dicta of *Los Angeles Lumber*, 308 U.S. 106, is misplaced and ironic. In *Los Angeles Lumber*, the Court stated, in the course of rejecting a reorganization plan, that participation of old equity could be permissible only if the old stockholders are the only available source of capital investment.

> 'Generally, additional funds will be essential to the success of the undertaking, and it may be impossible to obtain them, unless stockholders are permitted to contribute and retain an interest sufficiently valuable to move them....'

308 U.S. at 117 (quoting *Kansas City Terminal Ry. Co. v. Central Union Trust Co.*, 271 U.S. 445, 455 (1926)).

> Where that necessity exists and the old stockholders make a fresh contribution and receive in return a participation reasonably equivalent to their contribution, no objection can be made.

Id. at 121.

If *Los Angeles Lumber* is at all pertinent to construction of Code Section 1129(b), it invalidates the notion of a preemptive purchase right in old equity. Indeed, it teaches that old equity is a capital source of last resort. It assumes that the market has not and will not provide a superior offer.

Moreover, the new value dicta of *Los Angeles Lumber* and other cases under the old Bankruptcy Act do not address or consider the grant of operational control and exclusivity rights to old equity, because the provisions of the old Act under which those cases arose, Chapter X and its predecessor, Section 77B, did not provide any such rights. *See infra* at 26-27. *See also* Bruce A. Markell, *Owners, Auctions, and Absolute Priority in Bankruptcy Reorganizations*, 44 Stan. L. Rev. 69, 118 (1991) ("[E]xclusivity with respect to plans subject to the fair and equitable requirement is a Code innovation. . . ."). The controversy as to old equity's alleged preemptive purchase right only arises in the context of a Code that grants an exclusivity period and control rights to a debtor in possession.

As the Fourth Circuit concluded in *Bryson Properties*, "[t]his exclusive right to contribute constitutes 'property' under § 1129(b)(2)(B)(ii), which was received or retained on account of a prior interest." 961 F.2d at 504.[15]

4. There Is No Policy Justification For A Preemptive New Value Rule.

This Court has recognized that the policies underlying Chapter 11 of the Bankruptcy Code are to maximize the value of the estate and to encourage business reorganization, thereby preserving jobs and protecting investors. *Toibb v. Radloff*, 501 U.S. ____, 111 S. Ct. 2197, 2201 (1991). The court of appeals' new value rule serves only to undermine these policies.

Old equity's exercise of an exclusive purchase right raises the palpable risk that the estate will be robbed of value. The "new value" transaction is an exercise in self-dealing. Both sides of the transaction — the decision to sell and decision to buy — are within control of the same persons, old equity. Accordingly, the decision of the court of appeals sets up dangerous incentives for the debtor and its pre-petition owners to violate their fiduciary duties to creditors. *See Pepper v. Litton*, 308 U.S. 295, 306-07 (1939). *See also Wolf v. Weinstein*, 372 U.S. 633, 649-50 (1963).

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[15] *See also In re Lumber Exchange Ltd. Partnership*, 125 B.R. 1000, 1008 (Bankr. D. Minn.), *aff'd on other grounds*, 134 B.R. 354 (D. Minn. 1991), *aff'd*, 968 F.2d 647 (8th Cir. 1992) ("A special opportunity or right afforded to members of a class of equity security holders to retain or acquire an equity position in a reorganized debtor through a new cash contribution under a plan is, by its very nature, the opportunity or right to receive or retain property on account of the prepetition interest held."); *In re Outlook/Century Ltd.*, 127 B.R. 650, 654 (Bankr. N.D. Cal. 1991); *Piedmont Associates v. Cigna Property & Casualty Insurance Co.*, 132 B.R. 75, 79 (N.D. Ga. 1991); *A.V.B.I.*, 143 B.R. at 740-41. *See also* Anthony L. Miscioscia, Jr., *The Bankruptcy Code And The New Value Doctrine: An Examination Into History, Illusions, And The Need For Competitive Bidding*, 79 Va. L. Rev. 917, 946-47 (1993); Markell, *supra*, at 117-21.

The potential for "new value" abuse has been widely recognized.[16] As one district court put it, the old owner "is controlling the sale of the property through the reorganization plan and thereby ensuring himself a bargain basement price." *Piedmont Associates v. Cigna Property & Casualty Insurance Co.*, 132 B.R. 75, 79 (N.D. Ga. 1991).

Moreover, in Chapter 11, the leverage inherent in any preemptive purchase option is vastly increased by the informational advantage old equity enjoys as debtor in possession. Even the staunchest academic supporter of a new value exception, Professor Elizabeth Warren, notes that "[t]he DIP [debtor in possession] planning to participate in the post-reorganization business has substantial information advantages that permit self-dealing and depress the market for control, notwithstanding the DIP's fiduciary duties." Elizabeth Warren, *A Theory of Absolute Priority*, 1991 Ann. Surv. Am. L. 9, 34 (1992).[17] *See also* Douglas G. Baird, *The Elements of Bankruptcy* 250 (1992).

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[16] *See, e.g.*, Leonard M. Rosen, *Book, Chapter and Worse*, July-Aug. 1992 Business Law Today 47, 49 ("Creditors are unfairly treated by a debtor's use of the so-called 'new value' exception."); 3 Epstein, *supra*, § 11-2 ("Only by arranging for others to investigate the value of the concern and allowing them to bid against the shareholders on a fair basis is one likely to determine the true going-concern value.").

[17] Professor Warren explains:

> The incentives pressing on a DIP who plans to become an owner of the post-reorganization business are clear: keep the ownership value of the business depressed, and buy it for a bargain price in the plan of reorganization. The specter of self-dealing is a powerful concern in any proposed management buyout. Professors Brudney and Chirlstein examine this concern in the corporate arena generally, arguing for a per se prohibition on management participation in a buyout. In a bankruptcy reorganization, management self-dealing can rob an estate of value, depriving it of money to pay the outstanding debt.

Warren, *supra*, at 17 (footnote omitted).

Finally, valuation of the interest being sold, without exposing it to the market or providing any opportunity to bid, is problematic, particularly in single asset bankruptcies like this one. Typically, and specifically in this case, even after bankruptcy discharge of the unsecured debt (principally the mortgage lender's deficiency claim), the single asset debtor's property will remain fully encumbered. Under Code Section 1129(b)(2), the lender's mortgage lien will survive the bankruptcy stripped down to the value of the collateral. Therefore, upon confirmation of a plan there will be *no* equity in the property.

This Court's decision in *Ahlers*, however, teaches that ownership of a fully encumbered enterprise has value, however difficult it may be to determine. 485 U.S. at 207-09. At best, the equity value of such reorganized debtor is "highly speculative."[18] In large part, the value of ownership of the reorganized single asset debtor must be based on judgments by market players as to the property's potential for future appreciation and the extent to which current value of the property reflects temporary market dislocation.

5. At The Very Least, A Cramdown Sale Of Ownership To Old Equity Cannot Be Confirmed Without Exposing That Transaction To The Market.

If the equity owners of an insolvent debtor are permitted to participate in ownership of the reorganized debtor, over objection of an impaired unsecured creditor class, there must, at the very least, be opportunity for a competitive bid or counterproposal

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[18] "In single asset real estate cases where the property is fully encumbered, the capitalized earnings value presumably has been entirely allocated to the valuation of the secured claim, as required by § 506 and the absolute priority rule. That leaves the question of how to value the highly speculative equity." *See In re SM 104 Ltd.*, 160 B.R. 202, 229 (Bankr. S.D. Fla. 1993).

to set the price of the equity interest being sold. Even Professor Warren acknowledges that market opportunities are advisable. Warren, *supra*, at 23, 26-27. *See also Outlook/Century*, 127 B.R. at 654 n.4 ("[D]ebtor would not retain or receive property 'on account of' its equity interest, if it purchased at a sale that was open to other purchasers and at which the debtor had no advantage"); *In re Bjolmes Realty Trust*, 134 B.R. 1000, 1011 (Bankr. D. Mass. 1991) ("But because every unsecured creditor is granted an identical right [to the right of old equity to bid], this is clearly not the receipt or retention of property 'on account of' a stock interest within the meaning of the statute."). *Accord In re Ropt Ltd. Partnership*, 152 B.R. 406, 412-13 (Bankr. D. Mass. 1993).

In *Bjolmes*, a single asset real estate case, the court required, as a condition to confirmation of the plan, that an auction be held among the shareholders and creditors interested in purchasing a 100% ownership of the reorganized entity. The *Bjolmes* court concluded that in cases involving non-publicly traded shares, "the only way to measure the proposed contribution against actual market value is to offer the stock for sale." 134 B.R. at 1010. "If the fresh contribution exception were applied through valuation by the court, the absence of market forces would give shareholders undue leverage." *Id.* at 1011.[19]

Amici submit that the precise contours of any market mechanism, if the Court adopts such an approach, should be fleshed out by lower courts with appropriate record basis. Obviously capital structures of different debtors vary, ranging from the typical single asset debtor's structure (mortgage debt, minimal trade debt and equity) to complex structures of publicly

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[19] The court found no need to place the property on the open market to encourage third party buyers because the first mortgagee, the FDIC, had "substantial resources" and "is a likely buyer." *Id.* at 1010. The court ruled that the winner of the auction would be required to consummate the proposed plan, subject to modifications. *Id.* at 1010-11.

traded corporations, with many different layers of debt and equity.

It may be that no single mechanism is appropriate for all case types. For example, the National Bankruptcy Conference suggests an opportunity for competing plans as a solution. *See* National Bankruptcy Conference, *supra*, at 253. "[T]he concept restores a more level paying field." *Id.* at 255. Other market solutions also have been advanced.[20] *Amici* suggest that, in the single asset case, it may be appropriate to require a debtor proposing a new value cramdown (if such cramdown is permitted at all) to set forth a bidding mechanism in the debtor's plan, so that creditors are not burdened with the time and expense of preparing their own plans and disclosure statements.

This is not to say that an opportunity to bid is a sufficient check against overreaching in every new value transaction. For example, there may be no bidders because of thinness in the market. "In the case of the small business the market for control is likely to be thinnest and the possibility of DIP self-dealing is likely to be highest . . . With a thin market to compete for the purpose of control of a failing business, the DIP may be able to set the price alone." Warren, *supra*, at 18. Accordingly, courts must closely scrutinize the price and terms of any potential sale of debtor property to an insider and should withhold approval where not satisfied that the estate value is maximized. 1 Epstein,

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[20] *See, e.g.*, Richard L. Epling, *The New Value Exception: Is There A Practical Workable Solution?*, 8 Bankr. Dev. J. 335 (1991) (suggesting *inter alia* that creditors be permitted to credit bid under certain circumstances and also suggesting that a court controlled auction may be fairer than submission of competing plans); Miscioscia, *supra*, at 948-56 (favoring the *Bjolmes* auction approach and noting that competing plans also give parties in interest an opportunity to bid); Markell, *supra*, at 121-23 (proposing that creditors be allowed to credit-bid their debts to check possible owner underbids); Lawrence B. Gutcho, *Real Estate Lenders and the Battle Over "New Value"*, 110 Banking L.J. 423, 436-38 (1993).

supra, § 4-4. At the very least, however, market discipline, with fair opportunity to bid or offer counterproposals, should be brought to bear.

B. THE PLAIN MEANING OF THE STATUTORY TEXT SHOULD BE HELD TO CONTROL CONSTRUCTION OF SECTION 1129(b).

The need for a consistent and principled approach to construction of the Code dictates a reversal of the decision below. Under Section 1129(b)(2), the "fair and equitable" requirement for confirming a plan by cramdown "includes" the stricture that a dissenting unsecured creditor class be paid in full or old equity "not receive or retain" any property "on account of" its prepetition interest. On its face, the Bankruptcy Code describes the absolute priority requirement of Section 1129(b)(2)(B)(ii) as a *minimum* requirement for cramdown plan confirmation. The word *includes*, which precedes the listing of confirmation requirements in Section 1129(b)(2), means that the courts can impose more requirements, not provide exceptions that eviscerate the minimum.[21]

Nevertheless, the court of appeals, relying on *Dewsnup*, 112 S. Ct. 773, found that the term "includes" in Section 1129(b)(2) "leaves room" for the addition of a new value exception to the stated rule. 2 F.3d at 912.

In *Dewsnup*, the Court stressed the primacy of pre-Code practice in construing the Code, noting that "[w]hen Congress amends the bankruptcy laws, it does not write on a clean slate." *Dewsnup*, 112 S. Ct. at 779 (citation omitted) (internal quotations

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[21] *See A.V.B.I.*, 143 B.R. at 743 (rejecting existence of new value exception); *Outlook/Century*, 127 B.R. at 656 (rejecting existence of new value exception).

omitted). *Dewsnup* advises lower courts to incorporate pre-Code bankruptcy concepts unless "convinced that Congress intended to depart from the pre-Code rule." *Id.* at 778. The decision below relied heavily on *Dewsnup* to import a new value exception into Chapter 11. 2 F.3d at 912-13.[22]

The court of appeals' application of *Dewsnup* stands in stark contrast to *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989), where the Court directed that "the plain meaning of legislation should be conclusive, except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *Id.* at 242 (internal quotation marks and citation omitted).[23]

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[22] Other lower courts similarly have done so. *See, e.g., In re Snyder*, 967 F.2d 1126, 1129 (7th Cir. 1992) (dictum); *In re One Times Square Assocs. Ltd. Partnership*, 159 B.R. 695, 707 (Bankr. S.D.N.Y. 1993); *In re S.A.B.T.C. Townhouse Ass'n, Inc.*, 152 B.R. 1005, 1009 (Bankr. M.D. Fla. 1993).

[23] In urging the Court in *Ahlers* to rule that there is no new value exception the Solicitor General emphasized:

> *Nothing in the legislative history suggests a congressional intention to maintain the exception* discussed in *Los Angeles Lumber*. The House report, in describing proposed Section 1129(b), states: "The general principle of the subsection permits confirmation notwithstanding non-acceptance by an impaired class if that class and all below it in priority are treated according to the absolute priority rule. The dissenting class must be paid in full before any junior class may share under the plan." H.R. Rep. 95-595, *supra*, at 413. *No exceptions to this rule seem to be contemplated.*

Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988) (No. 86-958) (hereinafter "Solicitor General's Brief in *Ahlers*") at 21 (emphasis added) (footnotes omitted).

In general, the Court has embraced *Ron Pair*'s "plain meaning" approach to the statutory Code text. *See* Walter A. Effross, *Grammarians At The Gate: The Rhenquist Court's Evolving "Plain Meaning" Approach to Bankruptcy Jurisprudence*, 23 Seton Hall L. Rev. 1636 (1993) (analyzing numerous cases); Robert K. Rasmussen, *A Study Of The Costs And Benefits Of Textualism: The Supreme Court's Bankruptcy Cases*, 71 Wash. U.L.Q. 535 (1993). *Ron Pair* upholds "natural interpretation of the statutory language [that] does not conflict with any significant state or other federal interest, nor with any other aspect of the Code." 489 U.S. at 245.

The court of appeals and other lower courts have not adequately focused on the danger of holding that old case law, arising under a different statutory scheme, should control interpretation of the Bankruptcy Code. Moreover, none of the cases cited in the court of appeals' decision, including *Dewsnup* — a Chapter 7 case — analyzes, or even adverts to, the advisability of incorporating single elements of pre-Code reorganization law into the complex matrix of checks and balances that constitutes Chapter 11.

Chapter 11 was enacted in 1978 as a comprehensive overhaul of federal reorganization law. The three reorganization chapters of the old Bankruptcy Act of 1898, Chapter X (large business reorganizations), Chapter XI (small business reorganizations), and Chapter XII (real estate reorganizations), were combined into a single, new Chapter 11. 5 *Collier on Bankruptcy* (Lawrence P. King ed., 15th ed. 1993) (hereinafter "*Collier on Bankruptcy*") ¶ 1100.01[2]. Overall, dramatic changes were made in business reorganization cases.

Significant differences existed among each of the reorganization chapters of the old Act, as well as between reorganization practice generally under the old Act and current Chapter 11 practice. For example, in old Chapter X the debtor

had no exclusive right to propose a plan.[24] Instead, all persons *other than* the debtor could submit proposals for a plan to the trustee, and the debtor could not file a plan until the trustee's time to file had expired. 5 *Collier on Bankruptcy* ¶ 1100.01[1]. In contrast, under new Chapter 11, the debtor has an exclusive period to file a plan and to obtain its acceptance. *See* 11 U.S.C. § 1121(b), (c).

Under Chapter X, a trustee, with power to operate the business and investigate all pertinent matters, was generally required, while in Chapter XI, the debtor generally was permitted to remain in possession of its property and to conduct its business. 5 *Collier on Bankruptcy* ¶ 1100.01[1]; *see A.V.B.I.*, 143 B.R. at 743. Under new Chapter 11, the debtor ordinarily is allowed to remain in possession. 11 U.S.C. §§ 1107, 1108.[25]

In short, there was no singular pre-Code reorganization practice. Moreover, the new value exception arose in response to a problem under the old Act that does not arise under the Code. The Court's dicta in *Los Angeles Lumber*, 308 U.S. 106, out of which the discussion of new value arises, related to a "holdout" problem unique to the old Bankruptcy Act. Under the Act, a plan could be confirmed only if it was "fair and equitable" *to each dissenting creditor. See* Bankruptcy Act of 1898, Ch. X, § 221 (formerly codified as amended at 11 U.S.C. § 621 [1978]), *repealed by* Bankruptcy Code; Solicitor General's Brief in *Ahlers* at 14 n.13 (discussing old Chapter X and its predecessor, Section 77B). Not only was class acceptance required, but the

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[24] Under old Chapter XI the debtor had the exclusive right to file a plan for the duration of the case. 5 *Collier on Bankruptcy* ¶ 1100.01[1].

[25] Chapter X had an absolute priority (fair and equitable) rule. However, absolute priority was deleted from Chapters XI and XII of the Act in 1952. Markell, *supra*, at 91-92; Stephen W. Sather & Adrian M. Overstreet, *The Single-Asset Real Estate Debtor: A Selective Overview*, 2 J. Bankr. L. Prac. 343-47 (1993).

plan had to observe absolute priority as to minority dissenting creditors of the same class. *Id.*

The present Code is different. The Bankruptcy Code permits a creditor class, by a class vote that overrides the objections of minority members, to assent to a plan that is not "fair and equitable," *i.e.*, does not observe absolute priority. 11 U.S.C. § 1129(a)(8)(A). "Holdouts that spoiled reorganizations and created much of the motive for having judges 'sell' stock to the manager-shareholders no longer are of much concern, now that § 1126(c) allows the majority of each class (two-thirds by value) to give consent." *Kham & Nate's Shoes*, 908 F.2d at 1361.[26]

"New value" cramdowns were not established pre-Code practice.[27] The new value concept arose from dicta, not holding, in *Los Angeles Lumber*. Despite that dicta, the Court has *never* adopted the new value exception in a case holding. As acknowledged in the decision below, prior to passage of the 1978 Code, the last time the new value exception was even adverted to by this Court was in 1946. 2 F.3d at 912. Commentators note that *no* reported decision adopted the *Los Angeles Lumber* dicta as holding prior to the Code's adoption in 1978. Markell, *supra*,

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[26] Indeed, as noted by the Solicitor General in *Ahlers*, a substantial majority of bondholders had voted to accept the plan in *Los Angeles Lumber* and such bondholder consent would have been sufficient under the new Code consensually to confirm the plan under § 1129(a)(8)(A). Solicitor General's Brief in *Ahlers* at 14 n.13, 18 n.16.

[27] Epstein, Nickles and White observed in 1992:

> This wall, the absolute priority rule, has protected reorganization creditors quite effectively against debtor onslaught for nearly 80 years. However, in the past decade debtors have successfully breached the wall in a handful of cases under the banner of "new value."

3 Epstein, *supra*, § 11-25.

at 92; John T. Bailey, *The "New Value Exception" in Single-Asset Reorganizations: A Commentary on the Bjolmes Auction Procedure and Its Relationship to Chapter 11*, 98 Com. L.J. 50, 54 (1993).

Holding pre-Code practice to be an overriding canon, warranting the incorporation of isolated pieces of pre-Code practice and dicta into the Bankruptcy Code, ultimately will result in havoc being played on the Chapter 11 statutory matrix. To the extent that *Dewsnup* is perceived to be a command to follow such a canon, it should be limited by this Court.

CONCLUSION

For the reasons stated above, the decision of the court of appeals should be reversed and the case remanded to the bankruptcy court for further proceedings consistent with this Court's ruling.

Respectfully submitted,

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VIA FEDERAL EXPRESS

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Re: U.S. Bancorp Mortgage Company v. Bonner Mall Partnership

Dear Mr. Elsaesser:

Pursuant to Supreme Court Rule 37, I am writing to request your consent to the filing of a brief by The American Council Of Life Insurance as amicus curiae in support of the Petitioner's position in the Supreme Court in the above-captioned matter. Please indicate your consent by signing on the line provided below. After you have done so, please return this document to me.

Very truly yours,

SONNENSCHEIN NATH & ROSENTHAL

By: Lorie A. Chaiten
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CONSENT TO FILING OF AMICUS BRIEF:

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Seattle, WA 98101-3197

Re: U.S. Bancorp Mortgage Company v. Bonner Mall Partnership

Dear Mr. Anderson:

Please confirm, by signing below, that Petitioner U.S. Bancorp Mortgage Company consents to the filing of an amicus curiae brief on the merits by the American Council of Life Insurance in the above-referenced case. Your consent should be returned to my attention.

Very truly yours,

Robert B. Millner
Counsel for American Council
of Life Insurance

RBM:jp

CONSENT TO FILING OF AMICUS BRIEF:

By: _____
Bradford Anderson
Counsel of Record For Petitioner
U.S. Bancorp Mortgage Company

111558

SONNENSCHEIN NATH & ROSENTHAL

8000 SEARS TOWER

LOS ANGELES
NEW YORK
SAN FRANCISCO
ST. LOUIS
WASHINGTON, D.C.

94 FEB 22 AM 11:30 CAGO, ILLINOIS 60606-6404

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Robert B. Millner
(312) 876-7994

76E

February 18, 1994

Post-it™ Fax Note 7671	Date 2/22/94	# of pages ▶ 1
To Louis Charter	From Ford Elsaesser	
Co./Dept.	Co.	
Phone #	Phone #	
Fax # 312-876-7934	Fax #	

VIA FACSIMILE

Ford Elsaesser, Esq.
Elsaesser, Jarzabek, Buchanan
& Dressel
Lake Plaza Building
3rd and Lake Streets
Sandpoint, ID 83864

Re: Bonner Mall

Dear Mr. Elsaesser:

Pursuant to Supreme Court Rule 37, I am writing to request your consent to the filing of a brief by the Mortgage Bankers Association of America as amicus curiae in support of Petitioner's position in the Supreme Court in the above-captioned matter. Please indicate your consent by signing on the line provided below. After you have done so, please return this document to me by mail and facsimile.

Very truly yours,

Robert B. Millner

RBM/kh

CONSENT TO FILING OF AMICUS BRIEF:

By _____
Ford Elsaesser
Counsel for the Debtor

SONNENSCHEIN NATH & ROSENTHAL

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February 18, 1994

VIA FACSIMILE

Bradford Anderson, Esq.
Stoel, Rives, Boley, Jones & Grey
One Union Square
600 University Street
36th Floor
Seattle, Washington 98101-3197

Re: Bonner Mall

Dear Bradford:

Pursuant to Supreme Court Rule 37, I am writing to request your consent to the filing of a brief by the Mortgage Bankers Association of America as amicus curiae in support of Petitioner's position in the Supreme Court in the above-captioned matter. Please indicate your consent by signing on the line provided below. After you have done so, please return this document to me by mail and facsimile.

Very truly yours,

Robert B. Millner

RBM/kh

CONSENT TO FILING OF AMICUS BRIEF:

By _____
Bradford Anderson
Counsel for Mortgage Bankers
Association of America

TOTAL P.02